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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM 1947

No. 326

JOHANNA M. KIND AND HERMANN H. KIND, AS TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF HERMANN KIND, DECEASED, CROSS-PETITIONERS

v.

TOM C. CLARK, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Second Circuit (R. 426–442) is reported at 161 F. 2d 36. The opinion of the district court (R. 404–424) is not reported.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Second Circuit was entered on April 9, 1947 (R. 442). On July 8, 1947, the time within

which a cross-petition for a writ of certiorari might be filed was extended by the Chief Justice to September 6, 1947. The cross-petition for a writ of certiorari was filed on September 5, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code.

STATUTES INVOLVED

The relevant provisions of the Trading with the Enemy Act, as amended, are set forth in the Appendix to the petition for a writ of certiorari, No. 309, this Term.

QUESTION PRESENTED

Whether the circuit court of appeals properly set aside the ruling of the district court that the estate of which the cross-petitioners are trustees owned certain stock, and that a purported release and transfer of the shares by enemy interests to the American estate was not, as the circuit court of appeals thought, a "mere form employed to deceive the United States" in violation of the Trading with the Enemy Act.

STATEMENT

The cross-petition for a writ of certiorari is largely devoted to an attack on the correctness of the circuit court of appeals' rejection of the finding of the district court that the transfer of certain enemy property to the estate of which the cross-petitioners are trustees was valid and *bona*

fide. The facts are set forth in the petition for certiorari filed on behalf of Tom C. Clark, Attorney General (No. 309, this Term, filed August 29, 1947) and in the opinion of the circuit court of appeals (R. 426, 427–437). Briefly restated, those pertinent to the question presented by the cross-petition are as follows. The elder Hermann Kind, husband and father of the cross-petitioners, and, after his death, his estate, had for more than 50 years prior to the transaction in question been closely associated with J. A. Henckels K. G., a German co-partnership, and its American subsidiaries, including Graef & Schmidt, Inc. (R. 427, 428). The trustees of the estate in 1939 were the cross-petitioners, Hermann H. and Johanna Kind, and one Iwersen, who was also general manager of Henckels K. G. (R. 428). At that time, as the result of a complex reshuffle of the American holdings of Henckels K. G., implemented by a series of agreements between Henckels K. G. and the estate, the former owed the latter $130,000, secured by a pledge of the stock of Graef & Schmidt, Inc., the property in question in this case (Findings 3, 4, R. 405–6; R. 37, 39, 428). Graef & Schmidt, Inc., owed Henckels K. G. $134,000 (R. 117, 437).

In late September, 1939, Iwersen by cable and letter suggested that the estate take over the Graef & Schmidt stock in order that "the enterprises over there could be saved from a foreign

seizure" (Ex. CC 1, R. 272, 273). Iwersen emphasized that "at the end of the war" the estate was to make "a fair settlement of accounts (*Id.* at p. 274)—*i. e.*, return to Henckels the value of the Graef & Schmidt stock over and above the estate's security interest. At about the same time, Iwersen warmly assured the Devisenstelle and other German authorities that "the Estate of Hermann Kind will submit an exact accounting; in other words, that the interests of the firm of J. A. Henckels, Solingen, and thus the interests of the German Reich, as regards devisen, will be safeguarded in every respect" (Ex. BB 1, R. 269, 270). Hermann H. Kind and his associates were informed of these assurances (Ex. CC 1, R. 272, 274).

Much of the ensuing correspondence was between Iwersen and Voss or Bonner, respectively the Vice-President and Treasurer of Graef & Schmidt (R. 131, 132), rather than directly between Hermann H. Kind and Iwersen. Kind, however, carefully studied the letters Voss and Bonner received from Iwersen; their letters to Iwersen were "sometimes discussed with Hermann Kind before sending and always read by Hermann Kind after sending" (Finding 11, R. 411; Ex. II, R. 292, 294; Ex. I, R. 318; Ex. TTT, R. 334; Ex. BBB, R. 343; Ex. 30, R. 367). At the "suggestion" of Iwersen, Hermann Kind became President of Graef & Schmidt early in 1940 (R. 34; Ex. BBB, R. 343).

On October 24, 1939, the law firm of O'Connor & Farber, acting on behalf of the estate, addressed a letter to Iwersen and Henckels K. G., which purportedly offered to release the $130,000 indebtedness in consideration of the transfer by Henckels K. G. to the estate of all right, title, and interest in the pledged shares (Ex. 11, R. 290). On November 6, Iwersen, on behalf of himself and Henckels, cabled an acceptance (Ex. 12, R. 297). But on the same day Iwersen wrote O'Connor & Farber a letter which concluded (Ex. 14, R. 301, 302):

> If we have given our unconditional consent it is with the clear understanding that the Estate will pay itself by administrating or possibly liquidating the corporations of our property, and, therefore, all values saved over and above the claims of the Estate of Hermann Kind will be held at my disposal or at the disposal of J. A. Henckels Kommandit-Gesellschaft as the interests may be. In due time we expect a full and detailed statement of all transactions made.

On November 14, Voss wrote Iwersen that this "acceptance" was unsatisfactory to O'Connor & Farber, because it "would give an opening to a possible U. S. A. Alien Property Custodian" (Ex. NN, R. 308, 309), and two weeks later O'Connor & Farber wrote Iwersen to request from him and Henckels K. G. a letter releasing unconditionally all interest in the stock (Ex. 15, R. 316). Simultaneously, Voss and Hermann Kind wrote Iwer-

sen that "you may rest assured * * * that everything is being done to safeguard the interest of the firm Henckels" (Exs. I, J, R. 318, 319). Also, on November 28, Voss dispatched to Iwersen a "private letter", confirming his (Voss') understanding that the transfer was a pure formality, that some day there would be an exact accounting, and that the surplus would be returned to the German firm (R. 135, 139–141). While it does not appear that this "private letter" was shown to Kind, Iwersen referred to it and recapitulated its substance in an answering letter, dated January 6, 1940, to Voss (Ex. DDDD 1, R. 350), which Kind saw and discussed with Voss. Iwersen at the same time wrote to Kind, requesting written confirmation of the latter's understanding of the true nature of the transfer, adding that "the lawyers need not know anything about the letter" (Ex. PP 1, R. 352). On January 18, 1940, Voss and Kind, after consultation, replied that, while such a letter would not be in the interest of Henckels, because "in the event of war everything over $130,000 could be seized", the estate was, if Henckels insisted, willing to furnish it—adding that the "lawyers have nothing to do with this" (Ex. OO 1, R. 354; R. 93–94, 140–141; Ex. QQ, R. 357; R. 433). Iwersen thereupon wrote Kind that he would no longer insist on a writing, since the assurance of the estate's willingness was sufficient (Ex. RR 1, R. 357; R. 434). Meanwhile, on December 12,

1939, Iwersen and Henckels sent O'Connor & Farber a letter purporting unconditionally to release the pledged shares (Ex. 18, R. 353). Further correspondence did nothing to alter what Iwersen described as a "Gentlemen's Agreement" (Ex. VV 1, R. 369–370) and as late as November 26, 1940, Bonner wrote Iwersen that "although a possible surplus would be treated in accordance with the viewpoints set out in Mr. Voss' letter of November 28, 1939, the purely legalistic basis is nevertheless entirely different" (Ex. BBBB 1, R. 383, 385, 436). This letter was initialled by Kind (R. 144–145, 436). Iwersen reiterated his understanding that the transfer was a pure formality and that when circumstances permitted, the estate would refund the value of the shares in excess of its claim (Ex. GGGG 1, R. 382; Ex. JJJJ 1, R. 392; R. 436). The trustees never contradicted Iwersen in this understanding.

Graef & Schmidt, now ostensibly owned by the estate, remitted the full $134,000 to Henckels (R. 124, 168, 437) but had paid the estate in "dividends" only $63,000 before a freezing order precluded further payments (R. 11, 111). As Judge Frank, writing for the court below, has stressed, the estate, by foreclosure and sale of the stock, and if necessary, attachment of Henckels' claim against Graef & Schmidt, could have put itself in a far more favorable position to collect its claim against Henckels (R. 438–439).

ARGUMENT

1. The first three points of the cross-petitioners' argument (Cross-Pet. 10, 23, 25) amount to a claim that the circuit court of appeals could not, on the evidence, properly treat as "clearly erroneous" the findings of the trial court that the "transfer" of the shares was valid and *bona fide*. Such a question, having no significance beyond the case at bar, is not a ground for the issuance of a writ of certiorari. *United States* v. *Johnston*, 268 U. S. 220, 227; *Federal Trade Commission* v. *American Tobacco Co.*, 274 U. S. 543, 544; *General Pictures Co.* v. *Electric Co.*, 304 U. S. 175, 178; *cf. Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U. S. 508, 509. In any event, on the record as a whole, it is abundantly clear that the circuit court of appeals, fully mindful of the requirements of Rule 52 (a) of the Rules of Civil Procedure, decided the question correctly.

2. In Point IV of their argument (Cross-Pet. 26–27), the cross-petitioners urge that the decision below conflicts with decisions of the New York courts holding trustees to strict fiduciary obligations. The relevance of these decisions is obscure: assuming, *arguendo*, that consummation of the secret deal would have been detrimental to the estate and that it would be denied enforcement by the New York courts, there is no justification for reading into the decision below a contrary view. Nowhere does the court below suggest that

the secret agreement is enforceable; if it did, there might be some basis for the contention that the trustees were not held to as high a standard of loyalty as they should have been. The only relevance of the secret agreement to the court below was the effect it had of making it plain that neither party intended an outright transfer and sale of the stock. The true effect of the secret understanding was to negate the intent necessary to a valid transfer.

3. Point V (Cross-Pet. 27) is insubstantial. It is simply a restatement of the plaintiffs' contention that Henckels K. G. was not the beneficial owner of the shares. If the cross-petitioners are wrong in this, as we think they are, there could be no "confiscation of the property of citizens".

4. Point VI is similarly without substance (Cross-Pet. 28–31). The point seems to be based on the argument that since, at the time of the Vesting Order, the value of Henckels' equity in the stock was unascertained, no property existed which was subject to vesting. But prior to the sham transfer, the Germans were the beneficial owners of the shares, subject only to the plaintiffs' security interest. Since the ostensible transfer was a nullity, the beneficial ownership was retained by the Germans and properly vested by the Alien Property Custodian (R. 12). *Cf. Stoehr* v. *Wallace,* 269 Fed. 827, 838 (S. D. N. Y.), affirmed, 255 U. S. 239; *Matheson* v. *Hicks,* 10 F.

2d 872, 873 (E. D. N. Y.); *Standard Oil Co.* v. *Markham,* 64 F. Supp. 656, 664–665 (S. D. N. Y.). That the value of the vested property was conjectural is of no moment.

CONCLUSION

The decision of the court below on the questions presented by the cross-petition is correct, and there is no conflict of decisions. The cross-petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted.

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